

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1390

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

-v-

JAIME RAYO,

Appellant.
-----X

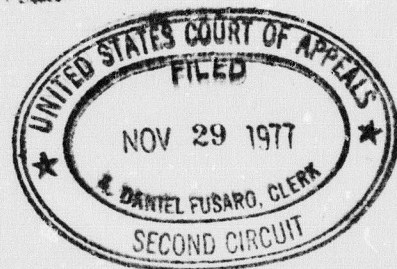
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Docket No. 77-1390

Bp/s

BRIEF FOR APPELLANT JAIME RAYO

Appeal From A Judgment Of
Conviction In The United
States District Court For
The Southern District Of
New York



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BRIEF FOR APPELLANT JAIME RAYO

Jaime Rayo appeals from his conviction of July 21, 1977, in the United States District Court for the Southern District of New York (Duffy, J.) upon an adverse jury verdict on one count of conspiring to import cocaine, and a second count of possessing it with intent to distribute. 21 U.S.C. 812, 841. He received concurrent seven-year sentences on each of the two counts (and three years special parole), but they run concurrently with a ten-year sentence on another narcotics conviction in the District of Oregon. Three other defendants, Moreno, Arroyo-Angulo and Gomez were tried and convicted along with Rayo and are also parties to this appeal. Rayo's counsel is assigned under the C.J.A.

This is another Colombian cocaine case. The importation this time was through a Colombian cargo vessel berthed in San Francisco, the narcotics dropped over the side and retrieved allegedly

by the swimmers Rayo and Arroyo, with the operation assertedly orchestrated from Colombia by Gomez and in San Francisco by Gomez and Moreno. The Government's case rested entirely on the credibility of Emilio Rivas, also a Colombian, whom Moreno invited to San Francisco to share in the cocaine's arrival. Southern District venue for the four defendants with no other contacts here rested on Rivas' purported sale in the district of the cocaine he received in San Francisco.

Judge Duffy conducted an exemplary trial. His fair-mindedness without gimmicks or advantages for either side makes the case for reversal a hard one, a difficulty compounded by the general thoroughness and diligence of the Assistant. The case, nonetheless, was a close one throughout. One defendant indeed was dismissed at the close of the Government's case. Rivas' credibility was very much in doubt throughout, and it took the jury close to three days of deliberation to decide to believe him. Thus, any error, even in a generally well-conducted trial, could make a difference. There were such errors.

QUESTIONS PRESENTED

1. Whether the district court erred in permitting the Assistant to bolster the credibility of its principal witness by reference to the provision of his cooperation agreement with the Government that he testify truthfully? The Assistant made the situation worse by asserting that if the jury failed to credit the witness, he would not receive the Government's aid in reducing his own twenty-year sentence, and the district court in fact would not reduce that sentence -- clearly questionable assertions.

2. Whether the district court erred in refusing to give a charge requested by defendants to focus on the crucial venue issue of whether the cocaine sold in New York was the same cocaine the witness picked up in San Francisco?

3. Whether the district court erred in permitting the jury to consider an alleged similar act in which the Government failed to prove criminal conduct by Rayo?

STATEMENT OF THE CASE

Emilio Rivas, Rayo, Moreno, Gomez and Arroyo all come from Buenaventura, Colombia. On February 19, 1976, Rivas was arrested in Manhattan as he attempted to sell a kilo of cocaine for \$26,000 to a Drug Enforcement agent (399).^{*} He promptly offered his cooperation to the Government (467). He identified his source as someone named Charlie (467, 475). He told the agents that he had been introduced to Charlie by Carmen Vivas, that he had met Charlie in a dance hall and received the cocaine in a meat market in Manhattan, and that Charlie had plenty of drugs but no one to whom to sell (473). At the agent's request, Rivas wore a recording device to a meeting with Charlie scheduled for that evening (470).

Rivas later pleaded guilty to a Southern District indictment based on the cocaine sale to the agent (445).^{**} His statement to Judge Werker on the guilty plea reiterated that the drug sale emanated from Charlie (493), repeating what Rivas had earlier told the agents who arrested him, and then the United States Attorney, his own attorney, and the Probation Department (493-94). When Judge Werker imposed a twenty-year sentence, however (498), Rivas decided the cocaine had not come from Charlie at all but from defendants in San Francisco via a Colombian ship. His new story, as

^{*} Numbered references, without more, are to the trial transcript. "A" denotes the Appendix to Appellants' Briefs.

^{**} Carmen Vivas was indicted as well.

he told it at trial, was basically this:

About 1973, Rivas bought a house in Brooklyn. He rented the top floor to two women, also from Buenaventura, who it turned out were aunts of defendant Guillermo Moreno from San Francisco (202). Rivas held legitimate jobs from time to time, but made his real income from dealings in marijuana (185) and cocaine (176, 184, 190).

In September, 1975, Rivas went to San Francisco with a Brooklyn supplier for a cocaine pickup from a Colombian ship (229). There he met Moreno (241) and Rayo (245). Moreno later twice visited his aunts in Brooklyn and told Rivas he could obtain drugs for him in San Francisco from ships berthed there (269). It was left that Rivas would go to San Francisco to pick up the drugs (270-71).

In late January, 1976, Rivas heard from Moreno and he and one of the aunts flew to San Francisco (272). A few days later defendant Gomez arrived and moved in with him (280). Finally the ship arrived and contact was made by Moreno and Gomez with the sailor who had the cocaine (336-37). Arrangements were made for Rayo and Arroyo to swim out for the cocaine, and Rivas to drive them to the docks and pick them up (283, 333, 365-66). They picked up a large bag with several packages of cocaine (370). Some were for Gomez (370). Rivas received one and a half kilos from Moreno for \$48,000 (382), brought them back to New York, sold some to various people, and a kilo to the agent in Manhattan who arrested him (399).

Indictment and Trial

In February, 1977, the Government indicted Moreno, Gomez,

Arroyo, and Rayo for the January, 1976, pickup in San Francisco. Count One (A21) charged a conspiracy to violate the narcotics laws from December, 1975, to February 19, 1976, the day of Rivas' arrest. The only connection with the Southern District was Rivas' kilo sale in Manhattan (Overt Act 8, A24). Count Two charged that sale as an unlawful distribution attributable to all the conspirators (A24-25). Another Colombian, Jose Jeroncio Ahon-Casquete, who originally loaned a car to Moreno and who was disturbed because Rivas, not he, went as the pickup driver, was also named but dismissed at the close of the Government's case. The sailor, known only as El Flaco, was a John Doe defendant and never arrested.

At trial the Rivas testimony, together with various attempts at corroboration which appellee undoubtedly will recite in its brief, constituted the Government's case on the swim itself and its ramifications back to New York. The proof against Rayo included two alleged similar acts. On May 27, 1976, agents picked up Rayo in a car in a skindiver's suit, at the San Francisco docks, early in the morning. They found no drugs in the car (1524). His statement to the agents was that he was a stowaway on a ship. In another, October 30, 1976, Rayo was arrested at the docks at Portland, Oregon, in a car from which cocaine had been thrown (1841-42). He was not, however, in a diver's suit and was not driving the car.

To win, the Government had to convince the jury that in spite of Rivas' abominable record and his overwhelming past propensity

to lie, he was now to be believed.* As to that, the Government introduced Rivas' cooperation agreement on his twenty-year sentence which required that he testify truthfully (211-12), and then argued at length on summation that that agreement furnished his motivation to be truthful here (A81-87). There was, in addition, a venue issue which defendants raised prior to and then again at trial based on the fact that the crime's only connection to the Southern District was Rivas' story that the cocaine for which he was arrested came not from Charlie, as he originally said, but from San Francisco. That issue became more significant when the analyzing chemist found that the New York cocaine had been cut with borates (855), whereas Rivas cut the San Francisco cocaine only with lactose and dextrose (184). The district court rejected the original and later venue challenges, without opinions. Although it did charge generally that the jury had to find that one overt act took place in this district (A68), it refused a request for a specific instruction on whether the cocaine Rivas sold in New York was the same as that he allegedly received in San Francisco (A79-80).

The jury was out the better part of three days. It ultimately returned guilty verdicts on both counts against the four appealing defendants.

* Rivas entered the country illegally in 1958 (167); was caught stealing at United Parcel where he once worked (174); received a jail sentence in 1971 for selling cocaine (179); and regularly dealt cocaine and marijuana in large quantities (183-85). He used a friend's name in buying a car and airline tickets and whenever it suited him (620), and lied to immigration authorities and his probation officer (519-20). And if he was telling the truth now, he had repeatedly lied, including to the court, his attorneys, and the authorities.

ARGUMENT

POINT I

THE GOVERNMENT SHOULD NOT HAVE BEEN PERMITTED TO BOLSTER RIVAS' CREDIBILITY BY EMPHASIS ON HIS AGREEMENT TO TELL THE TRUTH.

This appeal raises an issue now more frequently encountered in the district courts as the Government reduces to writing its cooperation agreements: May the Assistant bolster the credibility of a doubtful witness by referring to that agreement and then insisting that the witness must be telling the truth because otherwise he faces untoward sentencing consequences under the agreement? The Assistant's full remarks are in the Appendix, but the more pointed ones bear quotation here:

"And it is no secret at all that he has lied over and over and over again in the past to avoid being deported and receiving a heavy sentence, to avoid many, many bad things. So what you have to do is examine his motive in this trial. He testified here pursuant to a written agreement, which is in evidence as Government Exhibit 39. You heard it once but the microphone was a little bit crazy and I am not sure that you were really able to follow it so I will read it to you again. You can have it and take it back in the jury room, but this is a letter on the United States Attorney's letterhead to Mr. Joseph Stone, Mr. Rivas' lawyer." (A82)

* * * *

"That's what motivates Mr. Rivas in this trial to tell you the truth, not respect for the oath of office or for the oath that he took." (A83)

* * * *

"Now, he's motivated to tell the truth precisely to help himself. If he lies there is no agreement, there is no reduction of sentence. He's prosecuted, he's prosecuted for the crimes that he's admitted, for that swim, that pickup in October of 1975 with Cambindo." (A83)

* * * *

"He finally has a motive to tell the truth because he has no choice. The government has its foot on his throat. He is in jail for 20 years and he will be 60 years old before he gets out of jail unless he is doing something about it." (A84)

* * * *

"Do you think Judge Werker, the judge who sentenced him for 20 years while he was still saying, 'Well, I was a delivery boy,' do you think Judge Werker is going to look kindly on a man who says, 'I wasn't a delivery boy. I bought a kilo, sometimes two every six or eight weeks and I sold it as fast as I could get my hands on it.'"

"If he lies, if the government doesn't write a memorandum for him do you think Judge Werker is going to look kindly on his motion to reduce sentence?" (A87)

The problems, we submit, are three. First, the Assistant's remarks warned the jury that a defendants' verdict would mean that Rivas was a liar, that would void his agreement with the Government, and Judge Werker in turn would refuse to reduce his twenty-year sentence. The jury, in effect, was told that its verdict would decide not only the guilt of the four trial defendants, but the ultimate sentence for Rivas as well.

It is settled that a jury must arrive at its verdict without considering possible sentences. The Assistant's emphasis on the

twenty-year sentence to Rivas and his agreement with respect to it, however, urged the jury to do exactly that. Clearly, this should not have been done. United States v. Wiley, 534 F.2d 659 (6th Cir. 1976) (prosecutor may not refer to facts outside the record in explaining cooperating witness' bargain with Government and may not refer to "impending doom of the federal witness protection plan" if defendant acquitted); Evalt v. United States, 359 F.2d 534 (10th Cir. 1966) (prosecutor may not refer to penalty); United States v. D'Anna, 450 F.2d 1201, 1206 (2d Cir. 1971) (improper to refer to additional income tax burdens for jurors if defendant's proper tax not paid).

Second, the Assistant's statements were obvious misrepresentations of the facts. It was quite possible that the jury could acquit Rayo and his colleagues and the Government still "write a memorandum" for Rivas. Because the jury thought Rivas was a liar, in whole or in part, did not mean the Government thought he was a liar,* or would not assist Rivas before Judge Werker if it wanted Rivas' further cooperation in any other respect. And contrary to the Assistant's forecast of Judge Werker's actions (A87), there was in fact no indication whatsoever of what he might do on Rivas' application for a reduction. The Government's assessment of how

* The recent Bronfman trial in Westchester furnishes a good example of that. The jury thought Samuel Bronfman was a liar when he denied engineering his own abduction and acquitted defendants Lynch and Byrnes of kidnapping him. The District Attorney promptly stated that he thought Bronfman was telling the truth and would not prosecute him for participation in an attempt to extort ransom money from his father or for perjury.

truthfully Rivas testified could certainly not bind him.

Finally, the Assistant's argument amounted to an improper vouching of the witness' credibility. ABA, Standards Relating to the Prosecution Function, Sec. 5.18.*

The Government's emphasis on the agreement to have Rivas' testimony accepted was not atypical. Some judges spot the problem immediately and cut off the Assistant.** Others, as the Court below, fail to do so. This Court should settle the issue now, hold that remarks in this vein are improper, and reverse the convictions below obtained through them.

* Although defense counsel did not interrupt the Assistant's improper summation to object, they repeatedly objected to the whole notion of having the agreement before the jury and the Government's using its truth-telling requirements to bolster credibility (212-13), thus preserving the point in this Court.

** See, e.g., United States v. Tsanas, E.D.N.Y. (Mishler, J.), appeal pending in this Court, 77-1348, Tr. 156-58:

"THE COURT: I will not allow the witness to state that as a part of the agreement he promised to tell the truth, the Government cannot support the credibility of a witness by any agreement.

"Is he ready to testify to that?

"MR. KIMELMAN [Assistant U.S. Attorney]: He would, he would testify that that is a part of the agreement, Judge."

* * * *

"THE COURT: [The Assistant] confirmed my suspicion that you were ready to tell the jury that as a part of your agreement you were to tell the truth?

"THE WITNESS: Yes.

"THE COURT: I want you to eliminate that when you tell it to the jury.

"I don't think that the Government may support the credibility of a witness by saying, We had an agreement with him to tell the truth. If that were true, everybody who came on the witness stand would say that he agreed to tell the truth.

"When you took the oath, that is enough for us, so eliminate that from your agreement."

POINT II

THE DISTRICT COURT ERRED IN REFUSING
A REQUESTED CHARGE TO FOCUS SPECIFI-
CALLY ON THE VENUE ISSUE.

The Government really had no business trying this case here. Rivas, the co-conspirator, might have lived in Brooklyn and sold cocaine in Manhattan, but the defendants were all from the Far West, the events practically all took place there, and most of the evidence and witnesses were from there. Rule 18, F.R.Crim. P., gave the Government a technical venue basis if the crime was committed here, but that was satisfied only if Rivas was in fact selling the San Francisco cocaine in Manhattan and as to that there was not only the difference in the cutting agents mentioned earlier (p. 7, supra), but the fact that Rivas was a big dealer, had many different sources of supply (519), and had after all maintained that the cocaine came from Charlie.

This Court has supervisory power to order the indictment's dismissal under the facts stated, United States v. Fernandez, 480 F.2d 726, 731 (2d Cir. 1973), and we think that power should be exercised. Barring that, the Southern District connection was for the jury to decide under proper instruction, and unless it found such connection, there had to be an acquittal. United States v. Jenkins, 510 F.2d 495 (2d Cir. 1975); United States v. Buckhanon, 505 F.2d 1079 (8th Cir. 1974); United States Const., Art. III, Sec. 2; 6th Amendment; Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240 (1964); United States v. Cores, 346 U.S. 405 (1958). Whether the cocaine

Rivas sold in New York was the same cocaine he picked up in San Francisco was a close issue. Defendants were entitled to have the jury understand in haec verba that it had to decide this issue for the Government as well to return a guilty verdict. The district court's failure to so charge (A79-80) was error.

POINT III

THE JURY SHOULD NOT HAVE BEEN PERMITTED
TO CONSIDER THE PORTLAND SIMILAR ACT.

We suppose that evidence of Rayo's May, 1976, apprehension on the San Francisco docks had to be admitted on pattern no matter what its prejudice under F.R.Evid., 404, and this circuit's very tolerant persuasion on that rule. The Portland arrest in October, as the Government presented it, was different. Although Rayo was at the scene and the crime was proven, his involvement in it was not. That, coupled with the fact that the proof was so prejudicial (including vivid testimony of police chases through the streets of Portland), should have led the court to exclude it. It erred in failing to do so. United States v. Vosper, 493 F.2d 433 (5th Cir. 1974).

CONCLUSION

For the reasons stated above, the conviction below should be reversed and a new trial ordered.*

Respectfully submitted,

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DONALD E. NAWI (Assisting in the Brief)

* Appellant Rayo also relies on the points raised by co-appellants to the extent applicable.

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